

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MAX J. AYERS)	
Claimant)	
VS.)	
)	Docket No. 1,000,987
BRACKETT, INC.)	
Respondent)	
AND)	
)	
AMERICAN HOME ASSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the April 28, 2005, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

This is a claim for a November 13, 2001, accident. Claimant alleges he injured his right upper extremity on that date when he received an electrical shock at work. Claimant also alleges he has developed psychological problems due to the accident and resulting injury.

The April 28, 2005, Order for Compensation, which is one of several preliminary hearing orders that have been appealed in this claim, granted claimant temporary partial disability compensation. But respondent and its insurance carrier contend Judge Avery erred. They assert the issue is:

Whether the claimant suffered injury for which temporary total *[sic]* disability was granted under the order and, if so, did such injury arise out of and in the course of his employment with the respondent.¹

Respondent and its insurance carrier argue claimant has failed to prove his psychological condition is directly traceable to the physical injury he sustained in the

¹ Resp. Brief at 5 (filed May 31, 2005).

November 13, 2001, incident. And they further argue claimant has failed to prove he is unable to engage in substantial and gainful employment. Respondent and its insurance carrier's argument may be summarized, as follows:

As has been the recurrent theme with this administrative law judge through the course of this claim where he has undertaken the position of being an advocate for the claimant as opposed to acting as the impartial trier of fact in the matter. The administrative law judge has consistently shirked his judicial responsibility of remaining impartial in this matter. He has ordered medical treatment even though there is uncontested and conclusive evidence, even from the independent medical examiner he appointed, [that] shows that the injury for which such treatment was granted did not arise out of and in the course of employment and was in no way directly related to the injury to the claimant's arm.

Under this order the administrative law judge has for the fourth time in this claim overlooked the fact that claimant is represented by experienced and competent counsel and decided for himself what the claims of the claimant should be and act as his advocate as opposed to a disinterested trier of fact when issuing this Order. This action prejudice[s] respondent from the standpoint that it violates the requirement under K.S.A. 44-501(g) pertaining to the application [of] the provisions of the Act impartially to both employers and employees.

Neither claimant's nor respondent/insurance carrier's experts offer an opinion consistent with the administrative law judge's finding of a compensable psychological injury or that he is incapable of engaging in substantial and gainful employment. The administrative law judge's own expert could find no causative connection between the psychological conditions she found and the injury and yet he rejects the very opinion he requested, and all the other expert opinions on the issue for that matter, in favor of his unsubstantiated views.

Based upon the foregoing respondent/insurance carrier request that the Order entered by Administrative Law Judge Brad Avery on April 26 *[sic]*, 2005 be reversed and the Board enter an order finding that further ongoing psychological treatment is terminated[.]²

Judge Avery, however, summarized the issue and respondent and its insurance carrier's position somewhat differently at the April 26, 2005, preliminary hearing. The Judge stated:

² *Id.* at 7, 8.

It is respondent's position relevant to the temporary partial adjustment that claimant is at maximum medical improvement and no longer in need of psychological care to supplement the, or to cure him of any effects of his work-related injury³

The only issues before the Board on this appeal are:

1. Did the Judge exceed his authority by entering a preliminary hearing order that granted claimant temporary *partial* disability benefits for injuries the Judge determined the worker sustained in an accident that arose out of and in the course of the worker's employment?
2. If not, does the Board have jurisdiction at this juncture of the claim to review a preliminary hearing finding that a worker is temporarily and *partially* disabled?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

The April 28, 2005, Order for Compensation is a preliminary hearing order entered under K.S.A. 44-534a. Accordingly, the Board's jurisdiction to review that preliminary hearing Order is governed by that statute, which provides, in part:

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.⁴

In addition, the Workers Compensation Act provides the Board shall not review a preliminary hearing award entered under K.S.A. 44-534a "unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing."⁵

³ P.H. Trans. (April 26, 2005) at 5, 6.

⁴ K.S.A. 44-534a(a)(2).

⁵ K.S.A. 2004 Supp. 44-551(b)(2)(A).

Claimant alleges both physical and psychological injury due to his November 2001 accident. After considering the evidence, the Judge determined claimant was temporarily partially disabled, which is compensated based upon two-thirds of the difference between pre- and post-injury earnings.⁶

Following a preliminary hearing, an administrative law judge has the authority under K.S.A. 44-534a to award temporary total and temporary partial disability benefits for a compensable accident. But that statute does not provide that the Board has jurisdiction to reweigh the facts and determine whether a worker is temporarily partially disabled in a preliminary hearing appeal. Consequently, the Board does not have jurisdiction to review the April 28, 2005, Order for Compensation.

The legislature intended preliminary hearings to be summary in nature in order to afford injured workers with benefits in a prompt manner. The legislature recognized that many issues could be resolved at a later stage of the claim when the evidence could be more fully developed without unnecessarily delaying the payment of compensation. Consequently, the legislature developed a procedure for employers and their insurance carriers to recover benefits that are later disallowed.

In their brief to the Board, respondent and its insurance carrier also requested that the Board terminate claimant's ongoing psychological treatment. The Judge did not mention any such request when he summarized the issues at the April 26, 2005, preliminary hearing nor did the Judge address such a request in the April 28, 2005, Order for Compensation. Nonetheless, respondent and its insurance carrier are free to request a hearing before the Judge to address the issue of whether claimant's present psychological treatment is necessary and/or related to the November 2001 accident at work.

The Board does not have jurisdiction over this preliminary hearing appeal. Accordingly, the appeal should be dismissed.

WHEREFORE, the Board dismisses this appeal. The April 28, 2005, Order for Compensation remains in effect.

IT IS SO ORDERED.

⁶ K.S.A. 44-510e.

Dated this ____ day of June, 2005.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director